1978

Ellen Wright v. Jack R. Wright : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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ELLEN WRIGHT,	:	
Plaintiff & Appellant,	:	
vs.	:	Case No. ~~34,658~~ 15407
JACK R. WRIGHT,	:	
Defendant & Respondent.	:	

BRIEF OF RESPONDENT

Appeal from Judgment of the Fourth Judicial District Court in and for Utah County, State of Utah, the Honorable Allen B. Sorensen, Judge, presiding.

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TABLE OF CONTENTS

CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

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ELLEN WRIGHT,

Plaintiff & Appellant,

vs.

JACK R. WRIGHT,

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Case No. ~~34,658~~ 5407

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This action involves an appeal by the appellant from a decision denying appellant's petition for an increase of child support.

DISPOSITION IN LOWER COURT

The trial court denied appellant's petition for modifying the Decree of Divorce which would have increased child support.

RELIEF SOUGHT ON APPEAL

Respondent seeks to affirm the decision of the District Court.

STATEMENT OF FACTS

Appellant's statement on facts is substantially correct, however, respondent would add to said statement, the fact that respondent is a construction worker and that his employment is

seasonal. He testified that he only worked nine months in 1976, and that he had no overtime in that year as he did in previous years. (T page 18-19, lines 30, 1-12)

The defendant further testified that though his hourly rate of wages has increased that so has the inflation rate and in addition thereto, he supports his new wife and her four children. (P 23, lines 16-18). The defendant further testified that his present wife is expecting. (P 25, lines 23-24)

POINT I

THERE WAS NO ABUSE OF DISCRETION BY THE DISTRICT COURT.

The court has repeatedly ruled that the trial court is allowed a considerable latitude of discretion in its findings and a decree will not be overturned unless there has been a clear abuse of discretion. In Whitehead vs. Whitehead, 16 Utah 2d 197, 297 P. 2d at page 988, the court stated:

> "Due to the prerogative reposed in him under the law and to his advantage position, the trial judge must necessarily be allowed a wide latitude of discretion in such matters, and his judgment should not be changed slightly, nor at all, unless under the facts shown by the evidence it works a manifest in equity or in justice."

In Harding vs. Harding, (1971) 26 Utah 2d 277, 488 P. 2d 308, the court stated at page 310:

> "This proceeding seeking to modify the divorce decree is in equity; and it is the prerogative of this court to review the evidence, to make its own findings, and to substitute its judgment for that of the trial court when the ends of justice so require. However, due to the prerogatives and advantaged position of the trial court, we pursue that broad authorization

> under the certain rules of review which are now well established; its actions are indulged with the presumption of validity in correctness and the burden is upon the appellant to show a basis for upsetting them: either (1) that findings have been made when evidence clearly preponderates the other way; or (2) that there has been a misunderstanding or misapplication of the law, resulting in substantial and prejudicial error; or (3) that it appears plainly that there has been such an abuse of discretion that an inequity or injustice has resulted."

For similar holdings see also Lawlor vs. Lawlor, 121 Utah 201, 240 P 2d (1952); Mitchell vs. Mitchell, 527 P 2d 1359.

It is certainly clear that there was no abuse of discretion in the instant case and it is respectfully submitted that the trial court would have been in error if it had increased the support payments due by respondent.

POINT II

THE EVIDENCE IS CLEAR THAT APPELLANT FAILED TO SHOW A SUBSTANTIAL CHANGE OF CIRCUMSTANCES AS IS REQUIRED FOR MODIFICATION.

Craven vs. Craven, 119 Utah, 476, 229 P 2d, 301 (1951) states that an amount for child support may be modified when there has been a permanent material change of circumstances or conditions of the parties involved. On page 302 the court said, ". . . an award of support money may not be increased unless there has been a material change of circumstances. . ."

Appellant points out, quite correctly, that the Utah Supreme Court ruled in Harrison vs. Harrison, 22 Utah 2d 180,

450 P 2d 456 (1969) that an increase in the husband's ability to support his children is grounds for an increase in the amount awarded for support. However, an increase in salary is merely one of the factors to be considered by the trial court. In Craven (Supra) page 303, the court said:

> "We are cognizant of the fact that the appellant has remarried and that all probability he must now support his wife as well as himself out of his earnings. In cases such as the instant case, the trial court should take into account and give due weight to all the factors entering into the request for modification of a decree and make a determination which is equitable between the parties and which will not overburden a divorced father."

It is therefore quite clear that, after considering all factors, the trial court must find the material change in the husband's ability to support his children before it can modify the amount awarded. The testimony at trial, when applied to this test, shows there has been no material change in the respondent's ability to support his children.

The appellant bases his entire argument on the fact, as he alleges, that there has been a forty-one (41) percent increase in respondent's earning ability. However, his figures are misleading. The percentage is based on the base figure of $8.00 per hour, when the testimony was "a little over $8.00 per hour." (T page 23, lines 23-26) Testimony also shows that while the respondent previously was able to work twelve months a year with overtime to help him on his income, (T page 19, lines 4-6) at present he is only able to find work approximately nine months of the year and is getting no overtime.(T page 18 line 7-1

Had the respondent been able to work twelve months of the year, his total earnings would be something less than forty percent more than seven years ago. However, he has not worked twelve months a year, the figure would be closer to nine months, which makes his actual increase in earnings minimal. This ignores the increase in the cost of living over the last seven years, which would be double to triple his actual earnings increase.

These are not the only factors the trial court has to consider. Since the original decree, the respondent has remarried and has four children (T page 23, line 16-18) with his wife expecting another at the time this case went to trial (T page 25, lines 23-24). In other words, the respondent has six more dependants than he had seven years ago. Testimony also showed that respondent is having difficulty making the present payments (T pages 24-25).

In order to find for the appellant/plaintiff, the trial court would have had to find these facts amounted to a substantial change in the respondent's ability to support his children.

CONCLUSION

It is respectfully submitted that the trial court was correct in its determination in denying a modification of child

support and that no error was made by the trial judge.

Respectfully submitted,

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CERTIFICATE OF MAILING

Two copies of the foregoing were mailed, postage prepaid, David M. Crosby, attorney for plaintiff & appellant, 1325 South 800 East Suite 300, Orem, Utah 84057, this 15th day of February, 1978.

Robert L. Moody

ROBERT L. MOODY, Attorney